IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Arbitration Petition No 28 of 2005

Konark Infrastructure Pvt Ltd Petitioner.

Vs

The Kalyan Dombivli Municipal

Corporation Kalyan. ..Respondents

Mr Girish Godbole for the petitioner.

Mr.A.S.Rao for respondents.

CORAM: H.S. BEDI, C.J. ,

DATE: November 24, 2006.

P.C.:-

The respondents issued notice inviting offers for appointment of an agency for collection of octroi imposed and levied by the Kalyan Dombivli Municipal Corporation, Kalyan (KDMC). Alongwith the notice aforesaid chapter II containing the terms and conditions of contract Exhibit "A" was also issued. The petitioner submitted its offer pursuant to the said notice and the offer was accepted by the Commissioner, KDMC after the sanction had been received from the Government of Maharashtra. As per contract

clause 24 of Chapter II aforesaid, the terms and conditions of the contract were specifically made part and parcel of the letter of acceptance of the offer. A formal agreement dated 29th October 2004 Exhibit C was also executed by the parties, whereafter the petitioner started collection of octroi. As there appeared to be some delay in the payment of octroi installment to the Corporation, the Dy Commissioner wrote to the petitioner claiming interest on the delayed payments. The petitioner submitted its reply pointing out that no delay had in fact been occasioned. The petitioner also raised a dispute as to the liability to pay octroi on the diesel imported for the KDMC. The petitioner accordingly on (29th June, 2005) wrote a letter to the Corporation invoking clause 24 of the agreement Exh Q to the petition. The Commissioner, however, instead of referring the matter to the arbitration, replied vide Exhibit R dated 7th July, 2005 that the matter was not referable to the arbitration in view of the contract between the parties. The present petition has been filed under section 11 of the Arbitration and Conciliation Act, 1996, hereinafter called the “Act”, praying for the appointment of an arbitrator.

2. A affidavit in reply has been filed by the respondents and it has been pointed out that as the terms and conditions of the contract did not provide for arbitration and as per clause 24 of the agreement Exhibit R, the decision of the Municipal Commissioner was final, there was no arbitrable dispute.

3. Mr. Godbole, the learned counsel for the petitioner has, however, argued that on a cumulative reading of the documents on record it was clear that arbitration interse parties was clearly spelt out in case of a dispute. It has been pleaded that a clause for arbitration need not be confined to a particular document but could be inferred from several documents on record and he has in this regard placed reliance on the judgment of the Supreme Court in J.K.Jain and ors vs. Delhi Development Authority and ors AIR 1996 SC 318 and has also laid emphasis on sub-section (5) of section 7 of the Act . He has accordingly pointed out that if clause 24.0 of the offer document Exhibit A, letter of acceptance of the offer by the petitioner Exhibit B and clause 1 of the agreement read with clauses 24 and 25 of Exhibit C, were read together, the only inference that

would flow was that an arbitration clause did exist inter-se the parties.

4. Mr Rao appearing for the Corporation has, however, pointed out that the only relevant clause was clause 24 of the agreement Exhibit C and this clause by necessary implication excluded any arbitration as the decision of the Municipal Commissioner was final and binding between the parties. He has also referred to a judgment of the Supreme Court in Dresser Rand S.A. Vs Bindal Agro Chem Ltd and anr, reported in 2006 (1) SCC 751 in support of his plea.

5. The basic issue that would arise for consideration is as to whether an arbitration clause must be read only from one document or could be construed from more than one document on record. It would be seen that as per clause 2 (a) of the Arbitration Act,1940, arbitration agreement meant a written agreement to submit present or future differences to arbitration, whether an arbitrator was named therein or not. While construing this provision the courts have repeatedly held that a clause for arbitration could be discerned from various documents and not necessarily from the agreement alone. This legal position appears to have

been accepted under sub-clause (5) of section 7 of the Act, which clearly says that the reference in a contract to a document containing an arbitration clause constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. In other words the rule would be that the document construing an agreement is not the only document which may be looked at for the purpose of determining the existence or otherwise of an arbitration clause and that other documents which are referred to in the agreement can also to be looked into. Relevant part of clause 24.0 of offer document Exhibit A reads as under:

> "DISPUTES: In case of any dispute the same shall be referred to the Municipal Commissioner and his decision shall be final and binding on the agent if the agent is dissatisfied with such decision, the agent shall, within a period of 30 days from the receipt of the decision, shall indicate his intention to refer the dispute to Arbitration failing which the said decision shall be conclusive and the same shall not be questioned".

This offer has been accepted by the petitioner vide Exhibit B dated 19th October, 2004 and it had been specifically provided in this document that the offer had been accepted on the terms and conditions of the contract and formed part of the document submitted to the Corporation. Clause 1 of Exhibit C Agreement also refers to the fact that the decision the offer contract and letter of acceptance shall be binding upon the petitioner. Clauses 24 and 25 of the agreement Exhibit C are reproduced below:

> "24. In case of any dispute, or any difference with regard to the interpretation of the terms of this contract or any other dispute or differences, with regard to the levy, collection of octroi, the same be referred to the MUNICIPAL COMMISSINOER, whose decision is final and binding on the parties.
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> 25. Notice inviting the offer, terms and conditions of the contract, tender for, form of acceptance, form of agreement and form of performance of guarantee, shall be part and parcel of this agreement/contract".

It would be seen from the two clauses mentioned above that the offer, agreement, acceptance letter and even clause 1 of the agreement which forms the main plank of the respondent's case, clearly refers to acceptance of the terms in the offer contract. Mr. Rao for the respondents, has however, referred to clause 25 to argue that it had by necessary implication excluded any arbitration with respect to any dispute which may arise out of the agreement. To my mind this argument is of no avail to the Corporation. A cumulative reading of the aforesaid documents reveal that the arbitration clause did exist between the parties and that clause 24 cannot be read to mean specifically an exclusion of arbitration. As a matter of fact clause 25 clearly presupposes that documents prior to the execution of the contract would be part and parcel of the agreement. In this background the judgment cited by Mr. Godbole must be referred to. The facts in that matter were almost identical. The Supreme Court held that in such a situation the arbitration clause may not be part of the agreement, but as the agreement specifically referred to the terms and conditions as contained in the tender form, which is the case herein as well, the dispute was clearly arbitrable . The judgment cited by Mr. Rao does not advance the case

of the respondents. In this case there was no clause in terms of clause 25 or clause akin to an offer document, a letter of acceptance and further that there was no concluded contract between the parties as it remained inchoate. In the result it is directed that the arbitrator shall be appointed in terms of clause 24 of the agreement Exh A to the petition.

This petition is accordingly allowed.

CHIEF JUSTICE